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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 746

MILTON S. MAYER, APPELLANT

v.

DEAN RUSK, SECRETARY OF STATE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR APPELLEE

This appeal presents two issues for review by this Court. The first is the constitutionality of Section 6 of the Subversive Activities Control Act of 1950, as amended, 64 Stat. 993, 50 U.S.C. 785. Section 6 makes it unlawful for any member of a Communist organization which has registered under the Act, or against which there is in effect a final registration order of the Subversive Activities Control Board, to apply for a passport or to use or attempt to use any passport. Section 6 also makes it unlawful for any officer or employee of the United States to issue a passport to any person who he has reason to believe is a member of such an organization. The second issue is the constitutionality of the requirement imposed by the Secretary of State that an applicant

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for a passport declare under oath that he is not a member of such an organization.

Appellant, in making application for a passport, refused to sign the declaration required by the application form that he was not then, and had not been during the preceding twelve months, a member of an organization required to register under the Subversive Activities Control Act. The Secretary of State notified the appellant that, without such a declaration or other explanation,[1] the application was incomplete and it would not be processed until it was completed. Appellant then brought the present action to have Section 6 declared unconstitutional, to enjoin its enforcement, and to have a passport issued to him. The three-judge district court, following the previous decisions of another three-judge court in the same circuit in *Flynn* v. *Rusk*, Civil Action No. 3478–62, and *Aptheker* v. *Rusk*, Civil Action No. 3886–62, upheld the constitutionality of Section 6 of the Act. It further held that since the information sought by the required declaration was relevant to determining appellant's eligibility for a passport, the declaration was authorized and the Secretary's refusal to process the incomplete application was valid. Circuit Judge McGowan filed a concurring opinion in which he stated

[1] With regard to all declarations required on the application form there is the following provision:

"If any of the above mentioned acts or conditions have been performed by or apply to the applicant or to any other person to be included in the passport, the portion which applies should be struck out, and a supplementary explanatory statement under oath (or affirmation) by the person to whom the portion is applicable should be attached and made a part of this application."

that the case did not present the question of the constitutionality of Section 6. He reasoned that Section 6, at the least, determined that membership in the Communist Party was a relevant factor in issuing passports and that it was, therefore, proper to refuse to process appellant's incomplete application.

The central issue in this case is whether Section 6 of the Subversive Activities Control Act is constitutional—*i.e.*, whether membership in a Communist organization which has registered or been ordered to register under the Act is a valid ground for denial of a passport. If such membership is a proper basis for refusing to issue a passport, it is an appropriate subject for inquiry. The Secretary of State may therefore refuse to give any further consideration to an application, such as appellant's, which fails to include such basic information. *Briehl* v. *Dulles*, 248 F. 2d 561 (C.A. D.C.), reversed on other grounds, 357 U.S. 116; see *Konigsberg* v. *State Bar*, 366 U.S. 36; *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (C.A. D.C.), certiorari denied, 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288 (C.A. D.C.), certiorari denied, 366 U.S. 904; *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (C.A. D.C.), certiorari denied, 373 U.S. 951; *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826, certiorari denied, 348 U.S. 946.

Appellant attempts (J.S. 8) to bring the issue concerning the Secretary's refusal to process his application within the holding of this Court in *Speiser* v. *Randall*, 357 U.S. 513. That case held that California could not deny tax exemptions for veterans on the

ground that the applicants refused to swear that they did not advocate the overthrow of the government or the support of a foreign government against the United States in the case of war. In *Konigsberg v. State Bar, supra*, 366 U.S. at 53–56, this Court—in holding that a State could deny admission to the bar of an applicant who refused to answer questions concerning membership in the Communist Party—distinguished *Speiser* on two grounds, both of which are applicable here. First, *Speiser* was explicitly limited so as to distinguish *Garner v. Board of Public Works*, 341 U.S. 716, *Gerende v. Board of Supervisors*, 341 U.S. 56, and *American Communications Assn. v. Douds*, 339 U.S. 382, where this Court upheld statutes requiring that persons swear that they did not belong to the Communist Party or other subversive organization in order to obtain various positions. *Speiser* distinguished such cases on the ground that "[t]he principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public." Similarly, here, the purpose of the Act was not to penalize beliefs but to protect the country from internal subversion directed and supported by a foreign country. See *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 93–97.

Second, this Court held the oaths in *Speiser* unconstitutional because the statute placed the burden of proof at all stages on the applicant for a tax exemption. 366 U.S. at 53. As was found by the court below, in the passport procedure provided by the Sec-

retary of State, the burden is always upon the government (J.S. 16–17): "It is true that if an applicant stated on the application that he or she was presently a member of the Communist Party, denial of a passport could result after regular processing of the application under the pertinent State Department regulations but the situation could be the same if the applicant responded affirmatively that any of the other conditions which are valid reasons for denial of a passport applied to him. * * * In the procedure provided for and followed by the Secretary of State in determining whether any applicant is a member of the Communist Party, including a hearing before an examiner and right of appeal to the Board of Passport Appeals, the burden of proof is always upon the Government." In short, if Section 6 is constitutional, the judgment below should be affirmed.

Although we believe that the decision below is correct upon both issues, we do not urge that the issues are so frivolous as to be subject to a motion to dismiss. We do, however, oppose the motion to advance for oral argument filed in the parallel case, *Copeland v. The Secretary of State*, No. 1041 Misc., and any similar motion that may be filed in the instant case.

The question of the constitutionality of Section 6 is now before the Court in *Aptheker v. Secretary of State*, No. 461, this Term, probable jurisdiction noted, 375 U.S. 928. The appellant's brief has been filed and the case is scheduled for argument at the session beginning March 23, 1964. The appellants in *Copeland* and the instant case may file *amicus curiae* briefs if they so desire.

The issue concerning the validity of the question asked by the Secretary of State concerning the applicant's membership in the Communist Party is quite separate. The burden of meeting an accelerated briefing schedule would bear heavily upon the government during a time of year in which the preparation of government briefs in due course itself puts a heavy strain on the Office of the Solicitor General. It is important that the basic issue concerning the constitutionality of Section 6 be speedily resolved, but we see no reason why the second question, if probable jurisdiction is noted, should not be argued in its regular turn.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

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